



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Department of Health and Human Services--Request  
for Advance Decision  
File: B-232364  
Date: October 5, 1988

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### DIGEST

Proposed sole source award to qualified Indian contractor is permitted under the Buy Indian Act. Because the Buy Indian Act is a statutorily authorized procurement procedure, it is excepted from the "full and open competition" requirement of the Competition in Contracting Act. The Secretary of the Interior is granted broad discretion in purchasing the products of Indian industry in implementing the Buy Indian Act, and this discretion is not affected by provisions of the Federal Acquisition Regulation which pertain to small business set-asides.

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### DECISION

A contracting officer of the Indian Health Service, Department of Health and Human Services (HHS), requests an advance decision concerning the propriety of an anticipated sole-source award to a qualified Indian contractor, for a health care delivery system for Indian beneficiaries, under the Buy Indian Act, 25 U.S.C. § 47 (1982). In particular, the contracting officer questions whether the Competition in Contracting Act of 1984 (CICA) and the Federal Acquisition Regulation (FAR) restrict the broad discretion afforded to the Secretary of the Interior under the Buy Indian Act to award contracts to qualified Indian firms without obtaining full and open competition. 1/

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1/ The functions of the Secretary of the Interior for the maintenance and operations of hospital and health facilities for Indians were transferred to the Secretary of Health, Education and Welfare. 42 U.S.C. § 2001 et seq. (1982). The Secretary of Health and Human Services was thereby authorized to use the Buy Indian Act in the acquisition of products of Indian industry in connection with the maintenance and operations of hospital and health facilities for Indians. This authority was delegated exclusively to the Indian Health Service.

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The Buy Indian Act, 25 U.S.C. § 47 (1982), provides that:

"So far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior."

By Secretarial Order, the Secretary of the Interior delegated his authority under the act to the Commissioner of Indian Affairs. In implementing the act, the Bureau of Indian Affairs (BIA) adopted the position that in order for the agency to contract with qualified Indian contractors to the maximum practicable extent, before taking any procurement action, contracting officers should determine whether there are any qualified Indian contractors within the normal competitive area that could fill the procurement requirement. If so, the procuring agency may negotiate exclusively with Indian firms.

In considering protests concerning BIA determinations of whether or not to set aside a particular procurement for exclusive Indian participation, our Office concluded that because the Buy Indian Act confers broad discretion on the Secretary of the Interior in purchasing the products of Indian industry, absent a showing of clear abuse of discretion, the BIA was entitled to exercise this preference and negotiate exclusively with Indian firms, even for procurements which otherwise would have been subject to requirements for formal advertising. 56 Comp. Gen. 178 (1976); 50 Comp. Gen. 94 (1970); Oregon Paiute Contractors, Inc., B-216207, Oct. 22, 1984, 84-2 CPD ¶ 433.

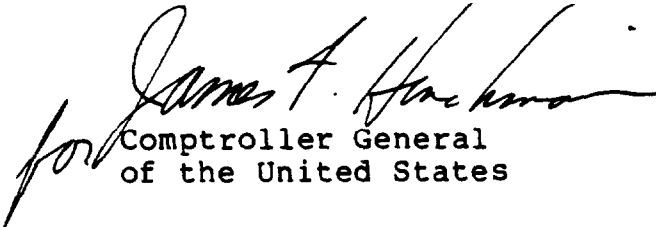
The HHS contracting officer questions whether, because CICA provides a broad mandate for obtaining full and open competition, the instant purchase which is being made pursuant to the Buy Indian Act is subject to the general requirement for competition, and whether the determination to set aside this procurement for exclusive Indian participation is also subject to the FAR "rule-of-two" applicable to small business set asides.

We find that CICA does not subject purchases made pursuant to Buy Indian Act procedures to the general requirement for competition, because CICA contains an exception which encompasses the Buy Indian Act. CICA requires that executive agencies obtain full and open competition, "except as provided [herein] and except in the case of procurement procedures otherwise expressly authorized." 41 U.S.C. § 253(a)(1) (1986). There is nothing in the legislative history of CICA which indicates any intention to modify or

restrict the scope of the Buy Indian Act. Accordingly, since we have recognized that the Buy Indian Act establishes a procurement procedure which exempts Indian set-asides from the requirements for competition, we believe that it remains so excepted under CICA, in accordance with the above-quoted language.

Further, there is no requirement that prior to setting aside such procurements there be a determination by the contracting officer that there is a reasonable expectation that offers will be obtained from at least two responsible qualifying firms, the so-called "rule-of-two," at FAR § 19.502-2 (FAC-84-37), which is applicable to total small business set-asides. Accordingly, the proposed sole-source award to a qualified Indian firm is within the discretion afforded to the Secretary of the Interior under the Buy Indian Act.

The HHS contracting officer has also questioned the possible application of Andrus v. Glover, 446 U.S. 608 (1980). However, that decision concerned a road construction contract and the court simply held that 41 U.S.C. § 252(e) [now 41 U.S.C. § 252(c)(1)(B) (Supp. IV 1986)] specifically prohibited the negotiation of road construction and repair projects, thereby overriding the authority of the Buy Indian Act. That holding is not relevant to the current procurement for health care.

  
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